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No. 86-

Supreme Court, U.S.
FILED
JUN 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

ALBERT L. WILSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MARY SUE TERRY
Attorney General of Virginia

*FRANK S. FERGUSON
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-2071

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

4308

QUESTION PRESENTED

DID THE COURT OF APPEALS ERR IN FINDING THAT RESPONDENT ASSERTED HIS RIGHT TO COUNSEL AT AN ARRAIGNMENT-TYPE PROCEEDING AND THAT A SUBSEQUENT INCRIMINATING STATEMENT WAS POLICE-INITIATED?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit from which certiorari is sought is reported at 806 F.2d 1232 (4th Cir. 1986), and is included herein as Appendix A. The opinion of the United States District Court for the Eastern District of Virginia, Norfolk Division, is unpublished but is included herein as Appendix B.

JURISDICTION

The opinion of the Court of Appeals was handed down on December 15, 1986. A Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied

on March 11, 1987. The jurisdiction of this Court to issue the Writ of Certiorari in this case is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. amend. V.
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. U.S. Const. amend. VI.

STATEMENT OF THE CASE

In the early morning hours of February 7, 1981, the Norfolk, Virginia home of two elderly sisters, Ida

and Diane Polen, was forcibly entered. During the breakin, Ida Polen, aged sixty-five, was bound hand and foot and her eyes, ears, nose and mouth were taped shut. Her fifty-nine year old sister was injured extensively on her face and neck. Those injuries, combined with suffocation, led to Diane Polen's death. A substantial amount of personal property, including money, clothing and silver, was taken during the course of the crimes. A police investigation led to the arrest of several individuals, including respondent Albert Wilson, for the crimes of murder, robbery, abduction and burglary.

The respondent was initially taken into custody on February 8, 1981. Detective Hemenway of the Norfolk Police Department approached the respondent and sought to question him concerning the crimes. Respondent was presented with a legal rights advice form which he refused to sign. He affirmatively answered each of the first four questions, which indicated that he understood his various rights pursuant to the decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). However, he refused to write in answers to the last two questions which were a waiver of his *Miranda* rights and a declaration that his statement was given freely and voluntarily. Respondent indicated that he was willing to talk but that he would not sign anything. The policeman made a notation to that effect, and respondent proceeded to disavow any knowledge of the crime; however, he never 1) refused to talk to the police, 2) asked to have questioning halted, or 3) requested counsel.

Within a day or two, respondent appeared in the General District Court for a routine initial appearance. As required by statute, he was advised at that

time of the amount of his bail and his right to counsel. Virginia Code § 19.2-158.[1] In response, respondent advised the Court at that time that he did not wish the Court to appoint counsel for him; rather, he would retain his own attorney. In the interim, the police had arrested a co-defendant named Vernon Lee Sessoms. According to Sessoms, respondent would want to talk to the police once he became aware that Sessoms had been arrested and had cooperated. Based upon this information, the police went back to the respondent and notified him that they had Sessoms in custody. Because respondent indicated disbelief, the officers arranged to have respondent see that Sessoms was being detained. Upon seeing Sessoms, respondent stated, "Hell, you've got it all. I'll go ahead and talk to you." Respondent was then readvised of his *Miranda* rights and he gave a statement which was subsequently introduced against him at trial.

Following trial by jury, verdicts of guilty were returned on the burglary and robbery charges, and respondent was acquitted of the murder and abduction charges. On April 12, 1982, adopting the jury's recommendation, the trial court imposed a life sentence on the robbery conviction and twenty years in the penitentiary on the burglary conviction.

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[1] Virginia Code § 19.2-158 provides, in pertinent part:

"Every person charged with an offense described in § 19.2-157, who is not free on bail or otherwise, shall be brought before the judge of a court not of record on the first day on which such court sits after the person is charged, at which time the judge shall inform the accused of the amount of his bail and his right to counsel."

After exhausting state appellate and habeas corpus remedies, respondent presented a petition for a writ of habeas corpus to the United States District Court for the Eastern District of Virginia, Norfolk Division, pursuant to 28 U.S.C. § 2254. That application, filed on January 3, 1985, was denied on May 10, 1985. Respondent's appeal to the United States Court of Appeals for the Fourth Circuit was accepted, and the Court specifically requested briefing and argument on the following issue: "Whether interrogation after request for counsel at initial hearing violated defendant's right to counsel under *Edwards v. Arizona*, 451 U.S. 457 (1981)." In the meantime, this Court issued its decision in *Michigan v. Jackson*, 475 U.S. ___, 89 L.Ed.2d 631 (1986). Based upon *Michigan v. Jackson*, a panel of the Court of Appeals reversed the district court, concluding that the incriminating statement made by respondent was inadmissible because it was taken pursuant to police-initiated interrogation after respondent had asserted his right to counsel at an arraignment or similar proceeding. Petitioner's subsequent petition for rehearing and suggestion for rehearing *en banc* was denied.

ARGUMENT FOR GRANTING CERTIORARI

THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT *MICHIGAN V. JACKSON*, 475 U.S. ___, 89 L.ED.2D 631 (1986) REQUIRED SUPPRESSION OF THE INCRIMINATING STATEMENT.

I. RESPONDENT'S INDICATION THAT HE WOULD SECURE HIS OWN ATTORNEY WAS NOT AN ASSERTION OF HIS RIGHT TO COUNSEL.

In *Edwards v. Arizona*, 451 U.S. 457 (1981), the defendant made a request for counsel after initial

questioning. The interrogation then ceased. The following day, police officers went to the jail and asked to see the defendant who indicated that he did not wish to speak to anyone. The defendant was told that he must talk and at that point police renewed questioning, despite defendant's objection. He was again given his *Miranda* warnings and thereupon made a statement. The *Edwards* court held that an accused, having expressed a desire to deal with police only through counsel, is not subject to further interrogation by the authorities until an attorney is made available or unless the accused himself initiates further exchanges concerning the crime. *Id.* at 484-485. Although the statement may have been voluntarily given, there was no valid waiver of the Fifth Amendment right to have counsel present during the questioning. Recently, this Court has extended the rule to apply when the assertion of the right to counsel is made at an arraignment or similar proceeding. The right to counsel in those instances is grounded in the Sixth Amendment. *Michigan v. Jackson*, 475 U.S. ___, 89 L.Ed.2d 631, 642 (1986). In *Jackson*, (consolidated with *Michigan v. Bladel*), the defendants were arrested and interrogated. Subsequently, each appeared at an in-court arraignment and requested the appointment of counsel, and the request was granted. Thereafter, the police reinitiated questioning, the defendants were advised of their *Miranda* rights, and incriminating statements were given. This *Jackson* Court held that:

> [I]f police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel

> for that police initiated interrogation is invalid. *Michigan v. Jackson,* 89 L.Ed.2d at 642.

The petitioner urges that respondent never asserted his right to counsel, therefore *Edwards v. Arizona* and *Michigan v. Jackson* are inapplicable.

The issue which was presented to the Court of Appeals was whether a defendant who makes a routine initial appearance in court for the purpose of bail and counsel determination asserts his right to counsel by merely advising the court that he will retain his own attorney. The Court of Appeals' decision holding in the affirmative fails to acknowledge the rationale underlying the rule of *Edwards v. Arizona* and, by extension, *Michigan v. Jackson.*[2] Respondent made no request that counsel be appointed at his initial court appearance, nor did he indicate a desire to have an attorney present during either of his meetings with the police. Not every mention by an accused of his need for counsel constitutes an assertion of that right during a confrontation with police. Declarations such as "...maybe I need a lawyer..." or "I think I should call my lawyer," have been held to fall short of a request for counsel during interrogation. *Cannady v. State,* 427 So.2d 723 (Fla. 1983); *People v. Krueger,*

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[2] The net effect of the Court of Appeals' decision below is to preclude the police from ever again approaching a defendant regarding an investigation, once he has made the initial statutorily-mandated court appearance. Because he must be brought before the court on the next day the court is sitting and advised regarding his right to counsel, except in the rare case where a defendant elects to proceed *pro se,* whatever response he makes to the court's inquiry will, according to the Court of Appeals, constitute an assertion of the right to counsel. Virginia Code § 19.2-158.

82 Ill. 2d 305, 412 N.E.2d 537 (1980). Accordingly, respondent never expressed a desire to deal with the police only through counsel. Absent a factual showing that respondent indicated he did not believe he was sufficiently capable of dealing with his adversary singlehandedly, there is no basis to support the Court of Appeals' extension of the *Michigan v. Jackson* rule to the facts of the instant case. The Court of Appeals' finding that *Michigan v. Jackson* is controlling implies that they also concluded that their decision did not represent an extension of the rule in *Michigan v. Jackson*. Such a conclusion is ill-founded. In delivering the decision of the *Jackson* Court, Justice Stevens noted at the outset that:

> The question presented by these two cases is whether the same rule applies to a defendant who has been formally charged with a crime and *who has requested appointment of counsel at his arraignment. Michigan v. Jackson*, 89 L.Ed.2d at 636. (Emphasis added.)

Subsequently, the opinion notes that:

> ...The reasons for prohibiting the interrogation of an uncounseled prisoner *who has asked for the help of a lawyer* are even stronger after he has been formally charged with an offense than before. *Id.* at 639. (Emphasis added.)

It is apparent then that the decision of the court below extended the rule established by this Court to situations which do not require the same protections to an accused. The respondent did not ask for the help of an attorney; the law should not presume such a request.

II. THE STATEMENT TAKEN FROM THE RESPONDENT WAS NOT OBTAINED AS THE RESULT OF POLICE-INITIATED INTERROGATION.

The prohibitions of *Edwards v. Arizona* and *Michigan v. Jackson* apply only when the confession is obtained as the result of police-initiated interrogation. *Edwards v. Arizona, supra* at 485; *Michigan v. Jackson, supra*, 89 L.Ed.2d at 642. Not every contact by the police with a person in custody is impermissible, even if such contact tends to prompt a statement. *See Rhode Island v. Innis*, 446 U.S. 291 (1980). Many interactions between an accused and the police are not "interrogations" within the *Miranda-Edwards* sense. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983); *United States v. Morrow*, 731 F.2d 233, 237 (4th Cir. 1984).[3] It may be to an accused's benefit, and he may wish to know, if there is a particularly strong case against him, or that his immediate cooperation will benefit him in the form of a reduced charge. Indeed, there are a number of kinds of information which the police might possess which an accused would wish to know. *Michigan v. Mosley*, 423 U.S. 96, 109, n. 1 (1975) (White, J. concurring).

Merely showing petitioner his co-defendant was not an interrogation. *See People v. Ferro*, 92 A.D.2d 298, 460 N.Y.2d 585 (1983). The Court of Appeals expressed some concern that Detective Hemenway

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[3] For example, encouraging an accused to cooperate is not questioning, *United States v. Guido*, 704 F.2d 674 (2d Cir. 1983), nor is making him aware of the existence of physical or testimonial evidence which may be used against him. *People v. Ferro*, 92 A.D.2d 298, 460 N.Y.S.2d 585 (1983).

hoped to obtain an incriminating statement when he advised respondent that Sessoms was in custody. This Court has recently held that an officer's mere hope that an accused will incriminate himself does not elevate the police conduct to a level where it may be deemed interrogation. *Arizona v. Mauro*, 55 U.S.L.W. 4601 (May 4, 1987). The *Mauro* decision also made it clear that unless the police subject an accused to compelling influences, psychological ploys or direct questioning, the police actions are not the functional equivalent of interrogation. *Id.* at 3083-3084. Clearly, no direct questioning occurred until after the petitioner initiated an interrogation by volunteering to give a statement. Nor did the simple act of advising respondent that a co-defendant was in custody compel the respondent to respond to questioning. Likewise, that act can scarcely be termed a psychological ploy when, as Justice White has said, such information may be valuable to an accused when he is assessing his alternatives. *Michigan v. Mosley, supra.* In judging whether the police conduct was improper, it is necessary to determine whether their words or actions were "...reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. at 301. This determination focuses upon the perceptions of the suspect rather than the intent of the police. *Arizona v. Mauro*, 55 U.S.L.W. at 4603-4604. There is no evidence in the record,[4] nor do the circumstances suggest, that the

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[4] Indeed, respondent maintained throughout that his confession was the result of threats and abusive tactics. The police denied this and the trial court accepted the police testimony. Accordingly, the decision at the suppression hearing focused on voluntariness.

respondent felt manipulated or coerced into confessing simply because the police demonstrated that a co-defendant was also in custody.

The Court of Appeals' decision utterly failed to address petitioner's assertion that the incriminating statement was not given as a result of police-initiated interrogation. Petitioner believes that this fact alone justifies remand to the court below. However, since this case was decided below, this Court has issued its opinion in *Arizona v. Mauro*, which petitioner asserts compels the conclusion that the police conduct was not an interrogation. No interrogation occurred until petitioner made his unsolicited declaration that he wished to talk. Manifestly, the "police-initiated interrogation" rule has two components—one, police initiation and two, questioning of an accused about an investigation after he has asserted his right to counsel. Because the actions of the police at the initial contact with the accused did not constitute an interrogation, those components are not present in the instant case.

CONCLUSION

In reversing the decision of the District Court, the Court of Appeals has relied upon the rule it has gleaned from *Michigan v. Jackson*. As petitioner has demonstrated, the Court of Appeals has misread the mandate of that case and extended that rule without a rational basis. Moreover, putting aside the assistance of counsel issue and assuming, *arguendo*, that respondent's conduct at his initial court appearance was an assertion of his right to counsel, the Court of Appeals failed to address the threshold inquiry whether the statement was taken as the result of police-initiated interrogation. This error by the court

below has become particularly clear since this Court decided *Arizona v. Mauro*. Accordingly, the need for clarification of the *Michigan v. Jackson* rule and the need for correction of the Court of Appeals' error mandates that certiorari be granted and the judgment of the Court of Appeals be reversed. In the alternative, certiorari should be granted and the case remanded to the United States Court of Appeals for the Fourth Circuit for review in light of this Court's decision in *Arizona v. Mauro*.

Respectfully submitted,

MARY SUE TERRY
Attorney General

FRANK S. FERGUSON
Assistant Attorney General

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-6462

ALBERT L. WILSON,

Appellant,

versus

EDWARD MURRAY, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk, Robert G. Doumar, District Judge. (CA 85-11-N)

Argued: July 18, 1986 Decided: December 15, 1986

Before WINTER, Chief Judge, and MURNAGHAN and ERVIN, Circuit Judges.

Martin J. Barrington (Donald J. Creach, Hunton & Williams on brief) for Appellant; Frank S. Ferguson, Assistant Attorney General (Mary Sue Terry, Attorney General of Virginia on brief) for Appellee.

MURNAGHAN, Circuit Judge:

Albert L. Wilson appeals from dismissal of his petition for *habeas corpus* under 28 U.S.C. § 2254. In his petition, Wilson challenged the admission in his state criminal trial of a statement elicited by the police from him after he had requested a lawyer at an arraignment proceeding. Wilson argues that the police initiated further discussions after his request for an attorney, in violation of his Fifth Amendment and Sixth Amendment rights to counsel, and that the statement should have been suppressed. The government, in addition to contesting the merits, argues that the appeal is untimely. We reverse the decision of the district court and grant the writ.

Sought for participation in a burglary that resulted in the death of one of two elderly sisters, Wilson was arrested pursuant to a warrant charging robbery, burglary, murder and abduction. After Wilson's arrest, the police attempted to interrogate him. When provided with a legal rights form, Wilson indicated that he understood his rights, including his right to refuse to answer questions and his right to an attorney, but declined to waive any of these rights.

The next day, Wilson was taken to General District Court for arraignment. At the arraignment, Wilson indicated his intention to obtain counsel of his choice. After arraignment, Wilson was returned to jail.

On the day following his arraignment, but before Wilson had made arrangements for representation, the police sought out Wilson in his cell for further discussion. It is undisputed that Wilson did not request the contact and that the police initiated it. Wilson was brought from his cell and confronted with a co-defendant, Vernon Sessoms, and was told that Sessoms had given a statement. Appellant claims that Detective Hemenway, the officer in charge, admitted to arranging the confrontation in order to prompt a confession, though the transcript of Hemen-

way's testimony on the point is not so unequivocal. In any event, Wilson gave a statement in which he admitted to recovering goods from the house.

At trial, Wilson pleaded not guilty. His confession was introduced at trial, after a hearing on his motion to suppress. The trial judge found that Wilson did not request an attorney during either of his interrogation sessions with the police. He found further that the second interrogation was initiated by the police, but that the statement was voluntarily given. Wilson testified at the suppression hearing that he had requested counsel during his arraignment and the Commonwealth did not dispute this. The trial judge did not make a determination regarding Wilson's request for counsel at arraignment.

In addition to the confession, testimony from a co-defendant linked Wilson with the crimes. The jury found him guilty on robbery and burglary charges, but acquitted him on charges of murder and abduction. Wilson was sentenced to imprisonment for life plus twenty years.

After exhausting his state appellate remedies, Wilson filed a petition for *habeas corpus* in the United States District Court for the Eastern District of Virginia. The district court referred the petition to a magistrate; in accordance with the magistrate's report, the claim was dismissed.

Turning to the merits of petitioners' appeal, as a threshold matter we must consider the Commonwealth's contention that Wilson filed his notice of appeal late, divesting this court of jurisdiction over the case. A notice of appeal must be filed within thirty days of entry of judgment. Fed. R. App. Proc. 4(a)(1). Entry of judgment consists of two steps: creation of a document setting out the judgment and a notation of the document on the docket sheet. Fed. R. Civ. Proc. 58, 79(a). The thirty day period does not begin to run until after the document is entered on the docket sheet. *Berman v. Schweiker*, 713 F.2d 1290, 1293

n.8 (7th Cir. 1983). Though the point is not beyond debate, the record on appeal shows that the appeal was timely. The district court's judgment was dated May 10, 1985. A stamp on the face of the judgment reads "FILED MAY 13, 1985." The docket sheet records filing of the order and judgment on May 13, 1985, though the judgment itself is dated May 10, 1985 in the docket notation. Wilson filed his notice of appeal on June 12, 1985. We conclude that the docket sheet date indicates that entry of judgment was completed on May 13, and that the appeal, filed on June 12, was timely. We therefore exercise jurisdiction over the appeal.

Turning to the substance of the appeal, this case presents an instance in which the police returned to interrogate a defendant after he had requested counsel at his arraignment. The Commonwealth does not deny that Wilson stated that he wanted to obtain his own attorney during his initial court appearance. It argues that Wilson's statements at the arraignment did not constitute an assertion of the right to counsel. The Commonwealth suggests that the defendant's statement indicating a desire to select his own counsel is somehow different than an assertion of the right to counsel. This rather strained argument cannot be reconciled with the Supreme Court's decision in *Michigan v. Jackson*, 106 S.Ct. 1405 (1986), where the Court rejected a similar argument and indicated that defendants' requests for counsel should be construed broadly. We agree that an uncounseled prisoner, untutored in law, cannot be stripped of his constitutional rights because of such technicalities. A defendant's statement the he intends to arrange representation is equivalent to a request for an attorney. Thus, Wilson's asking for an opportunity to arrange representation at arraignment must be understood as a demand to speak through an attorney at all subsequent stages of the prosecution.

In passing on Wilson's petition for *habeas corpus*, the district court addressed only the issue of whether Wilson's

statement was voluntary. The district court relied on the state court's finding of voluntariness, and the limited range of federal review of such findings in a *habeas* proceeding, 28 U.S.C. § 22454(d), to find that the state court's determination of voluntariness was presumptively correct. *See Sumner v. Mata*, 455 U.S. 591 (1982). The district court did not consider whether the interrogation of Wilson after his request for counsel at arraignment violated his constitutional right to counsel.

The voluntariness of the statement is not the only issue in a Fifth Amendment right to counsel case. As the Supreme Court instructed in *Edwards v. Arizona*, 451 U.S. 477 (1981), "the voluntariness of a consent or an admission on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries." 451 U.S. at 484. Recently, in *Moran v. Burbine*, 54 U.S.L.W. 4265 (March 10, 1986), the Court reiterated its view that the absence of coercion is a distinct issue from an understanding and intelligent waiver of constitutional rights. Wilson's statement may very well have been voluntary (that is, uncoerced) and yet given without a knowing and intelligent waiver of his Fifth and Sixth Amendment rights to counsel.

It is clear that the trial court did issue a determination with respect to one dimension of petitioner's decision to confess, in ruling that the confession was voluntary. But it is uncertain from the record before us, what, if any, findings of fact the court made regarding waiver, and whether the correct constitutional standard was applied. If the only question presented for this Court's review was whether the trial court had applied the correct constitutional standard in evaluating petitioner's understanding of his decision to confess, that issue alone would be a sufficient basis to remand the case to the district court or reverse. *See Smith v. Estelle*, 711 F.2d 677 (5th Cir. 1983), *cert. denied*, 466 U.S. 906 (1984); *Fuller v. Luther*, 575 F.2d 1098 (4th Cir. 1978); *Pierce v. Caldwell*, 572 F.2d 1339 (9th Cir. 1978).

But far more significant to this appeal is that the trial judge never ruled upon, and did not acknowledge the import of, the undisputed evidence indicating that the petitioner requested an attorney at his arraignment. The request for an attorney goes to the question of whether defendant subsequently waived his right to counsel, an investigation which the trial court did not embark upon in determining that Wilson was not coerced to confess. Compounding this omission is the rule that the existence of a waiver of the right to counsel after a request for counsel has been made according to a far more rigorous test than other waivers. Because the record clearly indicates that petitioner did make a request for counsel,[1] we must consider the legal implications of that fact.[2]

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[1] Petitioner testified during the suppression hearing that he had requested an attorney at his arraignment and this was uncontradicted. Indeed, in the course of the suppression hearing, the prosecution conceded that the request had been made. JA-86. In addition, the prosecution appears to concede this fact in their brief to this court, apparently trying to distinguish it from an assertion of the *right* to counsel. Brief of Appellee 4, 9. It is evident from the trial court's remarks in ruling on the motion to suppress that the court did not focus on the fact that the defendant had invoked his right to counsel at arraignment. Instead, in reaching its decision the court apparently relied on its finding that defendant did not assert his right to counsel in the course of either of the two police interrogations. Thus, the court neither fully considered the significance of petitioner's arraignment request, nor ruled on it. In addition, if the trial Court had found that Wilson did not request counsel at arraignment that ruling would not have been fairly supported by the record in view of petitioner's testimony and the Commonwealth's concessions. *See* 28 U.S.C. § 2254 (d) (8).

[2] Because the merits of the factual disputes of significance in this *habeas corpus* proceeding were not resolved in the state hearing, we are not overstepping the boundaries of deference which Federal Courts must observe in reviewing, in the context of *habeas corpus* proceedings, the factual findings of state trial courts. *See* 28 U.S.C. § 2254(d); *Sumner v. Mata*, 455 U.S. 591 (1982).

The distinction between waiver and voluntariness does raise the question of whether the waiver issue was litigated in state court and thus

The decision in *Miranda v. Arizona*, 384 U.S. 436, 445 (1966), makes clear that an accused has a right, grounded in the Fifth Amendment and applied to the states by the Fourteenth Amendment, to have counsel present during custodial interrogation. *See also Solem v. Stumes*, 465 U.S. 638, 641 (1984). Of course, once an accused has asked for counsel, he can thereafter waive the right at a later point and submit to interrogation. *North Carolina v. Butler*, 441 U.s. 369, 372-76 (1979).

The right to counsel at post-arraignment, custodial interrogation has another source, the Sixth Amendment. *Michigan v. Jackson*, 106 S.Ct. 1404, 1402 (1986). The Sixth Amendment provides a separate guarantee of assistance of counsel after arraignment, since arraignment "signals the initiation of adversary judicial proceedings." *United States v. Gouveia*, 467 U.S. 180, 187 (1984). Any effort by the government to elicit information from the

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whether it is properly before us. Wilson raised the waiver issue in his objections to the magistrate's report, though the issue of waiver was not specifically addressed by the state courts and the order of the district court dismissing the petition focused on the voluntariness issue. However, in *Edwards*, the Supreme Court corrected a state court decision which considered only voluntariness and did not address waiver. 451 U.S. at 483-84. On review of a petition for *habeas corpus*, the federal courts may not apply the plain error rule in Fed. R. Crim. Pro. 52(b), but are bound to the stricter standard of "cause and actual prejudice." *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977). The instant case falls somewhere between *Wainwright* and the average *habeas* case. Wilson objected at trial to introduction of the confession, and a suppression hearing was held. The issue of voluntariness predominated; even though voluntariness and waiver are formally discrete inquiries, they are sufficiently related to warrant our considering Wilson's appeal. In any event, the state's conduct in the instant case so blatantly violated the rule laid down in *Edwards* that it satisfies the cause and actual prejudice standard of *Wainwright*. *See Engle v. Isaac*, 456 U.S. 107, 135 (1982) ("[A] plain error standard is unnecessary to correct miscarriages of justice. The terms 'cause' and 'actual prejudice' are not rigid concepts; they take their meaning from the principles of comity and finality. . . . In appropriate cases, those principles must yield to the imperative of correcting a fundamentally unjust incarceration.").

accused, after the judicial machinery has been invoked, constitutes a "critical stage" of the criminal process, in which the accused has a right to counsel. *United States v. Henry*, 447 U.S. 264 (1980); *Brewer v. Williams*, 430 U.S. 387 (1977); *Massiah v. United States*, 377 U.S. 201 (1964). If anything, interrogation of a defendant once counsel has been requested at an arraignment is subject to even stricter constitutional constraints than simple custodial interrogation. *Jackson*, 106 S.Ct. at 1408; *United States v. Clements*, 713 F.2d 1030, 1034 (4th Cir. 1983).

The Supreme Court has made it quite clear that, absent a knowing, intelligent and voluntary waiver of the right to counsel, an accused, once he has requested counsel, must be left alone by the police until he had had the opportunity to consult with counsel. In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Supreme Court constructed a prophylactic rule of considerable impermeability:

> We now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his right. . . . [A]n accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has made available to him, unless the accused himself initiates further communication, exchanges, or conversation with police.

451 U.S. at 485.[3] *See also Rhode Island v. Innis*, 446 U.S. 291, 298 (1980). The Court went on to describe the test

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[3] *Edwards* is a case rather close on the facts to the present case. Edwards was arrested and charged with, among other things, first degree murder. On the first day of incarceration the police read him

for determining when a waiver has occurred. Waiver occurs when an individual makes a knowing and intelligent relinquishment or abandonment of a known right or privilege. *Edwards*, 451 U.S. at 482. Whether waiver has occurred is to be determined on a case-by-case basis, considering the "particular facts and circumstances surrounding [each] case, including the background, experience and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

Recently, the Supreme Court has created an even stricter rule in addressing the issue of waiver of the right to counsel when counsel is requested after the defendant is formally charged with an offense. In *Michigan v. Jackson*, 106 S.Ct. 1404, 1411 (1986), the Court held that if the police initiate interrogation after a defendant's assertion of his right to counsel at an arraignment, "any waiver of the defendant's right of counsel for that police-initiated interrogation is invalid." Based on both the Fifth and Sixth Amendment, the rule creates a binding presumption, in effect displacing the case-by-case analysis set out in *Edwards* for determining whether a waiver has, in fact, occurred. *Cf. Edwards*, 451 U.S. at 485 n.9 (waiver must be knowing and intelligent, when considered under the totality of circumstances).

This case falls squarely within the rule of *Michigan v. Jackson*. Petitioner asserted his right to counsel at arraignment, but before he could consult with his attorney, police initiated an interrogation and obtained a statement

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his rights and he agreed to submit to questioning. He made a statement denying culpability. Later he stated that he wanted to "make a deal," but that he would not do so until he could talk to a lawyer. Questioning ceased at that point. The next day, however, police returned to question Edwards, who declined to see the officers. The officers saw him anyway, and talked to him about a statement by a co-defendant. Edwards agreed to give a statement, and inculpated himself. Later, he attempted to suppress the statement at trial, and was rebuffed. The Supreme Court, on writ of *certiorari*, reversed the conviction. 451 U.S. at 477.

from him. Even if his statement was voluntary, in the sense that word is normally used, it was obtained in contravention of the bright line rule of *Michigan v. Jackson*: Once the right to counsel is invoked at arraignment, subsequent waiver is invalid.

The district court found, and the Commonwealth argues on appeal, that the error, if any, was harmless, because of the weight of other evidence in the case. Under *Chapman v. California*, 386 U.S. 18 (1967), the government bears the burden of proving beyond a reasonable doubt that evidence admitted under constitutional error was harmless. Apart from his confession, the Commonwealth's primary evidence against Wilson was testimony by a co-defendant which identified Wilson as one of five who broke into the house, and later split the proceeds. Also, the surviving victim identified Wilson as someone she recognized from the neighborhood. On the whole, Wilson was tried with several co-defendants, and the evidence regarding the brutality and extent of the crime was apparently graphic and complete. The evidence tying Wilson to the crime, however, was not overwhelming and the confession undoubtedly had a substantial effect on his conviction. *Cf. Jackson v. Denno*, 378 U.s. 368 (1964) (admission of confession taken in violation of defendant's due process rights held reversible error despite other substantial evidence of guilt); *Arthur v. Bordenkircher*, 715 F.2d 118 (4th Cir. 1983) ("Examples of error that cannot be harmless include the admission of a coerced confession, denial of counsel or lack of an impartial judge, or appeal to racial prejudice."). The error in admitting the confession could hardly be characterized as harmless.

To conclude, we hold that the appeal was timely and that the Commonwealth violated Wilson's Fifth Amendment right to counsel during interrogation, and Sixth Amendment right to counsel at a "critical stage" of the prosecution, by reinitiating discussions with Wilson after he had requested at arraignment the opportunity to consult

with an attorney. Admission of the resultant statement was prejudicial and the writ of *habeas corpus* should issue, though Wilson is subject to re-trial by the Commonwealth within a reasonable time.

REVERSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA NORFOLK DIVISION

CIVIL ACTION NO. 85-11-N

ALBERT L. WILSON,

Petitioner(s),

VS.

R.N. LANDON, DIRECTOR OF VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent(s).

FILED
MAY 13 1985

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision having been duly rendered,

It is ADJUDGED and ORDERED that this action be dismissed.

W. FARLEY POWERS, JR., CLERK
/s/ BETH T. WINGROVE
Deputy

Date: May 10, 1985

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL ACTION NO. 85-11-N

ALBERT L. WILSON, #128339,

Petitioner,

v.

ALLYN R. SIELAFF, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

FILED
MAY 10 1985

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254.

The petition alleges violation of federal rights pertaining to petitioner's convictions on April 12, 1982 in the Circuit Court of the City of Norfolk for robbery and burglary, as a result of which he was sentenced to serve life and 20 years, respectively, in the Virginia penal system.

The matter was referred to a United States Magistrate pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 29(A)(1) and (N)(3)(f) of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. Report of the magistrate was filed on April 9, 1985 recommending dismissal of the petition. By copy of the report, each party was advised of his right to file written objections to the findings and recommendations made by the magistrate.

The court received objections to said magistrate's report from petitioner on April 25, 1985.

The court, having examined the objections filed by the petitioner to the magistrate's report and having made *de novo* findings with respect to the portions objected to, does hereby adopt and approve the findings and recommendations set forth in the report of the United States Magistrate filed April 9, 1985 and it is, therefore, ORDERED that the petition be DENIED and DISMISSED on its merits and that judgment be entered in favor of the respondent.

Petitioner may appeal from the judgment entered pursuant to this *final order* by filing a *written* notice of appeal with the Clerk of this court, 307 United States Courthouse, Norfolk, Virginia 23510, within 30 days from the date of entry of such judgment. For the reasons stated in said report, the court, pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, declines to issue a certificate of probable cause for appeal.

The Clerk shall mail a copy of this order to the petitioner and to counsel of record for respondent.

/s/ ROBERT G. DOUMAR
United States District Judge

Norfolk, Virginia
May 10th, 1985

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL ACTION NO. 85-11-N

ALBERT L. WILSON, #128339,

Petitioner,

v.

ALLYN R. SEILAFF, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

MAGISTRATE'S REPORT AND RECOMMENDATION

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C.§ 2254. Petitioner is a prisoner in the Virginia penal system. The matter was referred to the undersigned United States Magistrate pursuant to the provisions of 28 U.S.C. § 636(B)(1)(B) and (C) and Rule 29(A)(1) and (N)(3)(f) of the Rules of the United States District Court for the Eastern District of Virginia.

A. STATEMENT OF THE CASE

1. Background

Petitioner was convicted of robbery and burglary on April 12, 1982 in the Circuit Court of the City of Norfolk. He was sentenced to imprisonment in the Virginia penal system for life and twenty years, respectively, and is currently serving those sentences. Petitioner attempted a direct appeal of his convictions to the Supreme Court of Virginia; the appeal was dismissed by order of December 9, 1982. Petitioner filed an application for a writ of habeas corpus in the Circuit Court of the City of Norfolk which

was dismissed by order of July 20, 1983. Petitioner then filed applications for writs of habeas corpus in the Supreme Court of Virginia which were dismissed by orders of September 24, 1984 and September 25, 1984.

2. Grounds Alleged

Petitioner alleges the following grounds for relief:

1. That the trial court erred in not suppressing petitioner's statement.

2. That the trial court erred in imposing a sentence which amounted to cruel and unusual punishment.

3. That the evidence was insufficient to support petitioner's convictions.

4. That petitioner was denied his right to a speedy trial.

5. That the trial court had no jurisdiction to try petitioner because statutory speedy trial requirements had not been met.

6. That he was denied the effective assistance of counsel because (a) his attorney failed to protect his right to a speedy trial and (b) his attorney failed to investigate the Fourth Amendment violation which occurred during petitioner's custodial interrogation.

B. FINDINGS OF ACT AND CONCLUSIONS OF LAW

Ground 1

Petitioner complains in Ground 1 that the court erred in not suppressing his statement. Petitioner gave his statement concerning his involvement in the robbery and burglary to law enforcement officials while in pre-trial custody. Petitioner contends that the trial court incorrectly determined that his statement was voluntarily given because the evidence showed that he had refused to answer any

question, had informed the court that he was seeking an attorney, and had been subjected to threats by police officers. A hearing was held during the course of petitioner's state criminal trial concerning the voluntariness of his statement (T. 76-106)[1] The trial judge denied petitioner's motion to suppress his statement and specifically found that petitioner was advised of his *Miranda* rights and then gave his statement voluntarily (T. 105).

Title 28 U.S.C. § 2254(d) provides, in part, as follow:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct . . . .

The statute then provides that a federal court shall not be required to presume the correctness of such state determinations if "the applicant shall establish or it shall otherwise appear, or the respondent shall admit" any of eight specific factors affecting fairness of the hearing or determinations. Petitioner has not alleged the existence of any of these conditions. It is plain from the state court trial transcript that none of these conditions existed and consequently none could be established by petitioner.

The United States Supreme Court has emphasized several times in recent years that the quoted provisions of 28 U.S.C.§ 2254(d) mean precisely what they say. See *Sumner v. Mata*, 455 U.S. 591 (1982) (*Sumner II*); *Sumner*

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[1] References in this form are to the transcript of petitioner's criminal trial on February 22, 1982, in the Circuit Court of the City of Norfolk.

v. Mata, 449 U.S. 539 (1981) (*Sumner I*). *See also Rushen v. Spain*, ___ U.S. ___, 52 U.S.L.W. 3452, 3453 (Dec. 12, 1983); *Marhshall v. Lonberger*, 459 U.S. 422 (1983). In *Sumner*, a state court had determined, after hearing, that a pretrial photographic identification employed by the police did not violate a petitioner's Fourteenth Amendment due process rights. A federal circuit court rejected the state court's determination and made findings of fact which were "considerably at odds" with the findings made by the state court. Reversing the federal circuit court's rejection of the state court's findings, the Supreme Court held that 28 U.S.C. § 2254(d) precluded a contrary determination by a federal court absent any of the factors enumerated in the statute. The Court reasoned that "[t]his interest in federalism recognized by Congress in enacting § 2254(d) requires deference by federal courts to factual determinations of all state courts." *Sumner I*, 449 U.S. 547. "This requirement could not be plainer." *Sumner II*, 455 U.S. at 592.

Based on the foregoing and in accordance with 28 U.S.C. § 2254(d), it is concluded that the determination of the state trial court adverse to petitioner on the question of the voluntariness of his statement is presumed to be correct.

Further, the admission into evidence of illegally obtained admissions or confessions will not require reversal where such admission constitutes harmless error. *Milton v. Wainwright*, 407 U.S. 371 (1972); see *Chapman v. California*, 386 U.S. 18 (1968). Assuming, *arguendo*, that the challenged statement was inadmissible, the record still contains the testimony of a co-defendant regarding petitioner's role in the crimes (T. 122-127). The evidence at trial, even without the challenged statement, established petitioner's guilt beyond a reasonable doubt. *Harrison v. Owen*, 682 F.2d 138, 141-42 (7th Cir. 1982).

It is concluded that there is no merit to Ground 1 of the petition.

Ground 2

Petitioner complains in Ground 2 that the trial court erred in imposing a sentence which amounted to cruel and unusual punishment.

It is not contested, and it is plainly true, that the sentences imposed do not exceed the maximum permitted by the statutes which made the conduct criminal.[2] A sentence not exceeding that which may be lawfully imposed under state law for violation of a criminal statute does not constitute cruel and unusual punishment. *Hutto v. Davis*, 454 U.S. 370 (1982), *reh'd denied*, 455 U.S. 1038 (1982); *Estelle v. Rummell*, 455 U.S. 263 (1980). *See Sneed v. Smith*, 670 F.2d 1348 (4th Cir. 1982).

It is concluded that petitioner's claim in Ground 2 is meritless.

Ground 3

Petitioner complains in Ground 3 that the evidence was insufficient to support his convictions.

The current standard for assessing sufficiency of the evidence to withstand due process scrutiny is set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). In *Jackson*, the United States Supreme Court established the rule that to withstand constitutional scrutiny, a state court conviction must be based on evidence sufficient to justify a rational trier of fact in finding guilt beyond a reasonable doubt. The Court stated that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable

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[2] See Va. Code §§ 18.2-58 and 18.2-89.

doubt." (Emphasis in original.) 443 U.S. at 319. An applicant is entitled to relief on the ground of insufficient evidence to convict only if it is found that "upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." 433 U.S. at 324.

The trial transcript readily supports a finding that on February 7, 1981 at 12:30 a.m., a group of men forced their way into the house of Ida and Diane Polen (T. 32, 123). Ida Polen was assaulted, bound, and gagged and then the men took money and several items of personal property from her house (T. 32-34, 40). Some eighteen hours later, Ida Polen was discovered, still bound and gagged (T. 63). Her sister, Diane, was found in the upstairs portion of the house, but she was dead as a result of the assault upon her person (T. 30).

Prior to the actual commission of the crimes, it is clear that petitioner and his co-defendants got together and planned the crimes (T. 123). They gathered tools to assist them in their venture and went to the Polen house together (T. 113). Lookouts, one of whom was petitioner, were placed on the street while the telephone wires were cut and the actual entry was accomplished (T. 113, 123). Petitioner was present throughout the commission of the crime and a co-defendant testified that petitioner entered the house to help remove the money and property (T. 123, 130). Petitioner's confession further establishes his intent to commit the crimes, his actual presence, and his sharing in the stolen property (T. 112-118).

The evidence, when viewed in the light most favorable to the prosecution, was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that petitioner committed all the elements of robbery[3] and burglary.[4] Un-

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[3] See Va. Code § 18.2-50 under which petitioner was charged and convicted of the subject robbery.

[4] See Va. Code § 18.2-89 under which petitioner was charged and

der *Jackson v. Virginia, supra,* there is no burden on the Commonwealth to disprove every conceivable hypothesis offered by a defendant, but only to prove its own theory of the case beyond a reasonable doubt.

It is concluded that petitioner's claim in Ground 3 is meritless.

Ground 4

Petitioner complains in Ground 4 that he was denied his right to a speedy trial.

Petitioner alleges violations of state law and federal constitutional rights. To the extent petitioner's claim is based upon a violation of state law, such claim is not reviewable in this federal proceeding. A claim presented in an application for writ of habeas corpus is cognizable only if a violation of a federal constitutional provision, law or treaty is alleged. *Rose v. Hodges,* 423 U.S. 19 (1975); *Chance v. Garrison,* 537 F.2d 1212 (4th Cir. 1976).

Petitioner also complains that the approximately nine month delay in bringing petitioner to trial violates his federal constitutional rights. There is no set limit for a speedy trial; rather, the court must balance the factors involved in the circumstances of each case. *Barker v. Wingo,* 407 U.S. 514 (1971). It is clear in this case that petitioner's right to a speedy trial was not violated. Three motions for a continuance were granted by the trial court and of these three, two were upon motion of petitioner and the third was with his concurrence.[5] Further, the petitioner has failed to show or assert any prejudice resulting from the nine month delay.

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[4] See Va. Code § 18.2-89 under which petitioner was charged and convicted of the subject burglary.

[5] See Exhibits II, III and IV attached to Respondent's Brief in Support of Motion to Dismiss.

It is concluded that petitioner's claim in Ground 4 is without merit.

Ground 5

Petitioner complains in Ground 5 that the trial court had no jurisdiction to try petitioner because statutory speedy trial requirements had not been met.[6]

Petitioner's claim is cognizable in federal habeas corpus proceedings if, and only if, the failure to comply with the requirements of the Virginia statute means that the sentencing court had no jurisdiction to sentence the appellant to jail. *Hailey v. Dorsey*, 580 F.2d 112 (4th Cir. 1978), *cert. denied*, 440 U.S. 937 (1978); *Pollard v. Riddle*, 482 F.Supp. 260 (E.D.Va. 1979). The record before this court clearly indicates that there was full compliance with the statute in question and, as stated in Ground 4 above, there is no fundamental defect present which would inherently result in a complete miscarriage of justice. *See* 580 F.2d at 115.

It is concluded that petitioner's claim in Ground 5 is not cognizable in this habeas corpus proceeding and that, furthermore, there is no merit to petitioner's claim.

Ground 6

Petitioner complains in Ground 6 that he was denied the effective assistance of counsel because (a) his attorney failed to protect his right to a speedy trial and (b) his attorney failed to investigate the Fourth Amendment violation which occurred during petitioner's custodial interrogation.

The current standard for measuring the effectiveness of counsel in criminal cases is "whether counsel's conduct so undermined the proper functioning of the adversarial proc-

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[6] See Va. Code § 19.2-243.

ess that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, ___ U.S. ___, 104 S.Ct. 2052, 2064 (1984). The court in *Washington* stated that a claim of ineffective assistance of counsel has two components. The defendant must first show that counsel's performance was deficient. Second, the defendant must show that the deficient performance of counsel was so prejudicial that the defendant was deprived of a fair trial. *Id.* at 2064.

The proper standard to be applied in an assessment of counsel's performance is that of reasonably effective assistance. *Id.* The defendant must show that counsel's performance fell below an objective standard of reasonableness. A court's examination of counsel's performance must be highly deferential and it must indulge a strong presumption that counsel's conduct does fall within the wide range of reasonable professional assistance. *Id.* at 2066. Every effort should be made "to eliminate the distorting effects of hindsight" and counsel's performance should be evaluated from the perspective counsel would have had at the time. *Id.*

An error by counsel, even if professionally unreasonable, will not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 2068.

The court in *Washington* emphasized that these standards are not mechanical rules and that the ultimate focus of inquiry must be the fundamental fairness of the proceeding whose result is being challenged. A practical application of these standards does not require an examination of both components of the claim. If it is more efficient to address an ineffectiveness claim on the ground

of lack of sufficient prejudice, then that course should be followed. *Id.* at 2070.

Petitioner first complains that his attorney failed to protect his right to a speedy trial. As discussed in Grounds 4 and 5 above, it is clear that petitioner was not denied his right to a speedy trial and that, in fact, the nine month delay occurred because of motions for continuances which were made in two instances at the request of petitioner, and in the third instance with his concurrence. There is no evidence of an error by counsel in this regard and petitioner has failed to show sufficient prejudice to merit relief.

Petitioner also complains that his attorney failed to investigate a Fourth Amendment violation which occurred during his custodial interrogation. A review of the trial transcript reveals that petitioner's counsel was intimately familiar with the details of petitioner's custodial interrogation and a motion was made by counsel to suppress the statement resulting from that interrogation (T. 101). A hearing was held during the course of the trial as a result of petitioner's motion and the circumstances of the interrogation were fully developed and ably argued by counsel (T. 76-106).

It is concluded that there is no merit to petitioner's claims in Ground 6 of the petition.

C. RECOMMENDATION

It is recommended the petition be DENIED and DISMISSED on its merits.

It is further recommended that the court decline to issue any certificate of probable cause for appeal required by Rule 22(b) of the Federal Rules of Appellate Procedure.

D. REVIEW PROCEDURE

By copy of this Report and Recommendation, the parties are notified that pursuant to 28 U.S.C. § 636(b)(1)(C):

1. Any party may serve upon the foregoing party and file with the Clerk written objections to the foregoing findings and recommendations within 13 days from the date of mailing of this report to the objecting party (10 days allowed by 28 U.S.C. § 636(b)(1)(C) and three days permitted by Rule 6(e) of the Federal Rules of Civil Procedure).

2. A district judge shall make a *de novo* determination of those portions of this report or specified findings or recommendations to which objection is made.

The parties are further notified that failure to file timely objections to the findings and recommendations set forth above will result in waiver of right to appeal from a judgment of this court based on such findings and recommendations. *Carr v. Hutto*, 737 F.2d 433 (4th Cir. 1984); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

Respectfully submitted,

/s/ JAMES T. TURNER
James T. Turner
United States Magistrate

Norfolk, Virginia
April 9, 1985

Clerk's Mailing Certificate

A copy of the foregoing Report was mailed this date to each of the following:

Albert L. Wilson #128339, *pro se*

Frank S. Ferguson, Esquire
Assistant Attorney General of Virginia, p.d.

W. Farley Powers,Jr., Clerk

By /s/ _____
Deputy Clerk

April ___, 1985

EDITOR'S NOTE

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No. 86-1936

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

EDWARD MURRAY, Director,
Virginia Department of Corrections,

Petitioner,

v.

ALBERT L. WILSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR ALBERT L. WILSON IN OPPOSITION

* Martin J. Barrington
Donald L. Creach

HUNTON & WILLIAMS
P. O. Box 1535
Richmond, Virginia 23212
(804) 788-8759

* Counsel of Record

QUESTION PRESENTED

Did the Court of Appeals correctly find that Albert Wilson's confession was obtained in violation of his Fifth Amendment and Sixth Amendment rights to counsel and should have been suppressed?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

No. 86-1936

EDWARD MURRAY, Director,
Virginia Department of Corrections,

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v.

ALBERT L. WILSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR ALBERT L. WILSON IN OPPOSITION

Albert L. Wilson ("Wilson") respectfully requests that the Petition for Certiorari filed by Edward Murray, Director, Virginia Department of Corrections ("the Commonwealth') be denied.[1/]

STATEMENT OF THE CASE

On February 8, 1981, Wilson was arrested by the Norfolk, Virginia police pursuant to an arrest warrant charging him with robbery, burglary, murder and abduction. Upon Wilson's arrest, Detective L. W. Hemenway sought to interrogate him. Hemenway presented Wilson with a Legal Rights Advice Form

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1/ Wilson concurs in the Commonwealth's report of the opinions below, statement of jurisdiction, and designation of the constitutional provisions involved. "J.A. ____" citations refer to the Joint Appendix filed in the Court of Appeals. Citations to the opinions below are made by reference to the Petition appendix, 1a to 26a.

which outlined Wilson's Miranda rights. Wilson acknowledged on the Form that he understood those rights, but he refused to waive the rights and refused to declare that any statement he made would be "free and voluntary."

The parties dispute whether Wilson said anything further that day.[2/] It is, however, uncontroverted that Wilson did not waive his right to counsel on February 8 and did not make any inculpatory statement. In fact, on that date Wilson adamantly refused to sign anything, including a form which merely indicated that the police had not taken any of his personal property.

Wilson remained in police custody after the February 8 interrogation. On either February 9 or February 10, Wilson was taken to General District Court for his initial appearance. There, consistent with his February 8 refusal to waive his right to counsel, Wilson told the judge that he wished to be represented by an attorney of his own choice and that he was attempting to make arrangements to retain an attorney. Wilson was returned to police custody after this court appearance.

During this same period the police arrested Vernon Lee Sessoms for participation in the crimes of which Wilson was accused, and the police obtained a statement from Sessoms. According to Hemenway's testimony, Sessoms told the police that Wilson would be willing to talk to the police once he knew that the police had Sessoms in custody and that Sessoms had

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2/ The Petition, in stating that Wilson "proceeded to disavow any knowledge of the crime" and that Wilson never refused to talk to the police, accepts as accurate Hemenway's testimony at the state court suppression hearing. (J.A. 108-09). That testimony, however, was contradicted by Wilson's testimony that all he told the police on February 8 was that he did not want to talk to them. (J.A. 122-23). The state court did not make any finding or ruling which resolved this dispute. Hemenway's version is not entitled to any presumption of correctness.

cooperated. By Hemenway's own testimony, it was for that reason -- i.e., because the police thought they could get Wilson to talk -- that the police returned to Wilson's cell on February 10. (J.A. 109-10, 118). It is undisputed, and the state trial judge expressly found, that the police initiated this contact wholly on their own and that Wilson never contacted the police to indicate any desire to talk to them.

According to Hemenway, when the police told Wilson they had Sessoms in custody, Wilson said he did not believe them. Wilson is not alleged to have said he wanted to see Sessoms, but merely is alleged to have said he did not believe the police. Again, acting wholly on their own initiative, the police removed Wilson from the Norfolk City Jail and took him to the Detective Bureau, where they confronted him with Sessoms. According to Hemenway, Wilson then agreed to talk to the police, and he gave a statement which admitted that he participated in removing goods from the house where the robbery and burglary occurred.

This incriminating statement was introduced into evidence at Wilson's trial over the objections of Wilson's counsel. The only other evidence at trial linking Wilson to the crimes was testimony from one of Wilson's co-defendants. Wilson was convicted of robbery and burglary and sentenced to imprisonment for life plus twenty years.

After exhausting his state appellate and habeas corpus remedies, Wilson filed a petition pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Virginia, Norfolk Division, asserting that the state trial court's failure to suppress his confession, which had been obtained in violation of his right to counsel, violated his constitutional rights. Acting on a magistrate's recommendation,

the District Court dismissed the petition. Wilson then appealed to the United States Court of Appeals for the Fourth Circuit. A unanimous panel of the Court of Appeals reversed the District Court and ordered that the writ of habeas corpus should issue, holding that the admission into evidence of Wilson's incriminating statement violated his rights to counsel under the Fifth and Sixth Amendments. The Commonwealth filed a petition for rehearing and suggestion for hearing en banc. No member of the Court of Appeals requested a poll on the suggestion for rehearing en banc, and the petition was denied. The Commonwealth subsequently released Wilson from prison. The instant Petition followed.

ARGUMENT

THE COURT OF APPEALS CORRECTLY FOUND THAT WILSON'S CONFESSION WAS OBTAINED IN VIOLATION OF HIS FIFTH AMENDMENT AND SIXTH AMENDMENT RIGHTS TO COUNSEL AND SHOULD HAVE BEEN SUPPRESSED.

The Commonwealth acknowledges that the Court of Appeals applied the correct standard in determining whether the confession should have been suppressed. This Court had established that standard very recently in Michigan v. Jackson, 475 U.S. ___, ___, 106 S. Ct. 1404, 1411 (1986):

> We thus hold that, if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.

The Commonwealth asserts, however, that two of the elements of that standard were not satisfied: The Commonwealth contends that Wilson's actions at the initial appearance did not constitute an assertion of his right to counsel and that the actions of the police did not constitute interrogation.

The Commonwealth simply disagrees with the Court of Appeals' conclusion as to how the particular facts of this case fit within the established standard. As this Court has long recognized, it is not the function of certiorari to provide such review of specific evidence and facts. See, e.g., United States v. Johnston, 268 U.S. 220, 227 (1925). The decision by the Court of Appeals was perfectly consistent with established Fifth and Sixth Amendment law. The instant Petition falls far short of justifying discretionary review under Sup. Ct. R. 17.

1. **WILSON ADEQUATELY ASSERTED HIS RIGHT TO COUNSEL AT THE INITIAL APPEARANCE.**

The Commonwealth contends that Wilson's statement at the initial appearance that he would retain his own counsel and was attempting to arrange for such representation was inadequate to assert Wilson's right to counsel. The Commonwealth's argument is that the right to counsel is only asserted when an accused requests that counsel be appointed. That argument is completely contrary to established Fifth and Sixth Amendment doctrine and the reasoning underlying that doctrine.

When Wilson was taken from the jail to the initial appearance, he appeared in court as a defendant who was "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." Kirby v. Illinois, 406 U.S. 682, 689 (1972). Up until that point, he had protected himself as well as he knew how. He had refused to sign anything, including the innocuous form indicating that the police had not taken any property from him.

At the initial appearance, Wilson was given an opportunity to tell the Commonwealth that he did not want to deal directly with it any longer, but wanted the Commonwealth to deal with him through the medium of counsel. See Michigan v.

Jackson, 106 S. Ct. at 1408-09 (citing Maine v. Moulton, 474 U.S. 159, ___, 106 S. Ct. 477, 487 (1985)). Wilson did not merely make a passing reference to counsel, but stated that he would be represented by counsel thereafter and was attempting to arrange for such representation. He did not waive his right to counsel or indicate that he would be proceeding pro se, as he could have done if he had wished to deal directly with the Commonwealth.

The Commonwealth seeks to create an artificial distinction between an accused's statement that he wishes to have counsel appointed and a statement that he wishes to be represented by counsel of his own choosing. Only if the accused is indigent and has counsel appointed would the Commonwealth find that the right to counsel attaches. This distinction is both hypertechnical and irrational, as the two types of statement equally demonstrate a desire to be represented by counsel in future dealings with the State. In rejecting the Commonwealth's argument, the Court of Appeals noted,

> This rather strained argument cannot be reconciled with the Supreme Court's decision in Michigan v. Jackson, 106 S. Ct. 1405 (1986), where the Court rejected a similar argument and indicated that defendants' requests for counsel should be construed broadly. We agree that an uncounseled prisoner, untutored in law, cannot be stripped of his constitutional rights because of such technicalities. A defendant's statement that he intends to arrange representation is equivalent to a request for an attorney.

4a. The distinction the Commonwealth urges would create a presumption in favor of finding a waiver of the right to counsel by a defendant with retained counsel, whereas fundamental Fifth and Sixth Amendment doctrine establishes a presumption against waiver and requires the State to satisfy a heavy burden in proving a waiver. See, e.g., Michigan v. Jackson, 106 S. Ct.

at 1409; Johnson v. Zerbst, 304 U.S. 458, 464 (1938). This Court has always recognized that the right to counsel attaches just as securely to a defendant who retains his own counsel as to an indigent defendant for whom counsel is appointed. See, e.g., Brewer v. Williams, 430 U.S. 387 (1977) (defendant with retained counsel); Weatherford v. Bursey, 429 U.S. 545 (1977) (same); Massiah v. United States, 377 U.S. 201 (1964) (same).

The Court of Appeals correctly concluded that Wilson asserted his right to counsel. That conclusion is not in conflict with any decision by this Court or by any other Circuit. This Court should not grant review of that conclusion.

2. THE POLICE SUBJECTED WILSON TO THE FUNCTIONAL EQUIVALENT OF INTERROGATION.

Either on the day of Wilson's initial appearance in court or the following day, and before Wilson had a chance to retain and confer with counsel, the police, acting purely on their own initiative, gratuitously undertook to advise Wilson that they had his co-defendant Sessoms in custody, then transported Wilson to the Detective Bureau and confronted him with Sessoms. As Detective Hemenway testified, the police took these actions because Sessoms had indicated that Wilson would talk with them once he knew that they had Sessoms in custody and that Sessoms had cooperated with them. The only conceivable purpose for these actions by the police was to obtain a confession from Wilson, and the Commonwealth has never proffered any other purpose. Indeed, to suggest that the police had any other purpose, such as to allow Wilson and Sessoms to renew their friendship, would be ludicrous.

The record does not clearly establish whether the police verbally questioned Wilson during this encounter. (Compare J.A. 110-11, 118-19 with J.A. 123-27). Even if they did not, however, they clearly engaged in the "functional

equivalent" of express questioning. The police may not circumvent the constitutional limitations on questioning by engaging in its functional equivalent: "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (footnotes omitted).

The police not only should have known that confronting Wilson with Sessoms was reasonably likely to elicit an incriminating response from Wilson, they did know such a response was likely and they fully intended to elicit such a response. (See J.A. 109-10, 118).

> Confronting an accused with incriminating evidence is a common and traditional way of prompting a recalcitrant suspect to confess. That it is also frequently an effective tactic may be judged by the volume of cases involving confessions so induced. . . . Faced with evidence indicating that the police already believe him to be guilty, an accused may conclude that he has nothing to lose by making a statement, or may fear that silence will be taken as an admission of guilt.

Toliver v. Gathright, 501 F. Supp. 148, 153 (E.D. Va. 1980) (footnotes omitted) (telling defendant about co-defendant's statement constituted functional equivalent of questioning); see also Wainwright v. State, 504 A.2d 1096, 1102-03 (Del.) (same holding), cert. denied, 107 S. Ct. 236 (1986); Tierney v. State, 404 So. 2d 206 (Fla. App. 1981) (same holding); People v. Thompson, 107 Ill. App. 3d 285, 437 N.E.2d 916 (1982) (telling defendant of co-defendants' incriminating statements and then, upon his expression of disbelief, taking defendant to see co-defendant in custody, constituted interrogation).

The Commonwealth asserts that the recent decision in Arizona v. Mauro, 107 S. Ct. 1931 (1987), compels a conclusion

that the police did not interrogate Wilson. This assertion fails to recognize the fundamental differences between Mauro and Wilson's circumstances. In Mauro, the suspect's wife, Mrs. Mauro, was being questioned at the police station at the same time that Mr. Mauro was being held there. Mrs. Mauro implored the police offers to let her talk with her husband. The police were reluctant to allow this contact to take place and counseled Mrs. Mauro not to speak to her husband, but finally gave in to Mrs. Mauro's continued entreaties. This contact between spouses led to the statement which was in issue.

This Court expressly noted, in finding that the police had not interrogated Mr. Mauro, "There is no evidence that the officers sent Mrs. Mauro in to see her husband for the purpose of eliciting incriminating statements." Id. at 1936 (emphasis added). Rather, the police reluctantly yielded to the entreaties of a distraught wife who wanted to see her husband. By contrast, the admitted purpose and the only conceivable purpose for the Norfolk police to confront Wilson with Sessoms was to induce Wilson to talk with them. Sessoms was not a spouse who wanted to talk with a spouse about the fate of their child, but was a co-defendant whose presence in jail and cooperation with the police would convince Wilson that he might as well talk with the police. The police's ploy worked exactly as planned, according to their purpose.

This Court noted in Mauro that there was good reason to "doubt that a suspect, told by officers that his wife will be allowed to speak to him, would feel that he was being coerced to incriminate himself in any way." Id. The Commonwealth speculates that Wilson similarly would have felt no coercion when confronted with Sessoms. Such speculation runs completely counter to common sense and traditional police tactics for

coercing statements, as noted in Toliver v. Gathright, supra. Sessoms and the police analyzed Wilson's likely perceptions and predicted that Wilson would feel coerced by Sessoms' presence. That prediction proved accurate, and there is no basis for second-guessing it now.[3/]

In addition, the focus on the perceptions of the suspect, while appropriate in a Fifth Amendment case like Mauro, is inapplicable to the extent the Court of Appeals' decision rests on the Sixth Amendment.

> Once the sixth amendment right to counsel attaches, law enforcement authorities cannot "deliberately elicit" incriminating statements from the accused in the absence of counsel. Massiah v. United States, 377 U.S. [201] at 206, 84 S. Ct [1199] at 1203 [(1964)]. To determine whether the authorities "deliberately elicited" a statement, courts look primarily to the intent of the police. [footnote] This is in contrast to the fifth amendment right to counsel inquiry.

United States v. Criswell, 696 F.2d 636, 639 & n.7 (8th Cir. 1983). As previously noted, the intent of the police here was to elicit a statement from Wilson.

The other case the Commonwealth cites on the issue of what constitutes interrogation, People v. Ferro, 92 A.D.2d 298, 460 N.Y.S.2d 585 (1983), provides even less support to the Commonwealth's argument. The Commonwealth neglects to tell the Court that this decision by the New York Supreme Court,

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3/ Even if there were a factual basis for speculating that Wilson did not feel coerced, that would not be dispositive. In Mauro, the Court cited Rhode Island v. Innis, 446 U.S. at 301, as "suggesting that the suspect's perspective may be relevant in some cases in determining whether police actions constitute interrogation." 107 S. Ct. at 1936 (emphasis added). The cited passage from Innis goes on to note that the intent of the police is also relevant and applies the element of police intent to the objective standard: "In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." 446 U.S. at 301 n.7.

Appellate Division, was reversed by the Court of Appeals of New York. See People v. Ferro, 63 N.Y.2d 316, 472 N.E.2d 13, 482 N.Y.S.2d 237 (1984), cert. denied, 472 U.S. 1007 (1985). In reversing, the Court of Appeals of New York expressly found that confronting the suspect with incriminating evidence did constitute questioning. "Where . . . the only possible object of the police action in revealing evidence to a defendant is to elicit a statement from him, it does no violence to logic to conclude that the police should have known that it would do so . . . ." Id. at 323-24, 472 N.E.2d at 17, 482 N.Y.S.2d at 241 (citations omitted).

The Commonwealth complains that the Court of Appeals for the Fourth Circuit did not explicitly address this issue in its written decision. At oral argument, the Court of Appeals engaged counsel for the Commonwealth in a lengthy colloquy on this issue and gave full consideration to counsel's arguments. In thereafter simply stating in the written decision its conclusion that Wilson was, in fact, interrogated (4a, 9a-10a), the Court of Appeals gave the Commonwealth's argument precisely the weight it deserves. This Court should not give this argument any further consideration.

CONCLUSION

The instant Petition utterly fails to satisfy the standard established in Sup. Ct. R. 17 as to when this Court will exercise its discretion to grant a writ of certiorari. The Court of Appeals correctly applied the decisions of this Court and of the other Courts of Appeal. The Petition should be denied.

Respectfully submitted,

Martin J. Barrington

* Martin J. Barrington
Donald L. Creach

HUNTON & WILLIAMS
P. O. Box 1535
Richmond, Virginia 23212
(804) 788-8759

* Counsel of Record

July 2, 1987